

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 NETWORK INDUSTRIES, INC.,

12 Plaintiff,

13 vs.

14 JUNGHEINRICH
AKTIENGESELLSCHAFT, et al.,

15 Defendant.
16

CASE NO. 11CV49 DMS (BLM)

**ORDER DENYING PLAINTIFF'S
MOTION FOR A TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

17 Pending before the Court is Plaintiff's *ex parte* motion for a temporary restraining order
18 ("TRO"), preliminary injunction, and order to show cause. For the following reasons, Plaintiff's
19 motion is denied.

20 **I.**

21 **BACKGROUND**

22 Jungheinrich Aktiengesellschaft ("J-AG") is one of the world's largest manufacturers of
23 industrial lift trucks. (Complaint ¶ 10.) For many years, Plaintiff was a distributor of J-AG's products
24 pursuant to a contract with Jungheinrich Lift Truck Corporation ("Jungheinrich"), J-AG's agent in the
25 United States. (*Id.* at ¶ 11.) Prior to December 30, 2009, Jungheinrich represented to Plaintiff that it
26 was necessary to terminate Plaintiff's distribution agreement with Jungheinrich. (*Id.* at ¶ 13.) In early
27 January 2010, Plaintiff executed a termination agreement with Jungheinrich and a contract with
28 Defendant Mitsubishi Caterpillar Forklift of America Corporation ("MCFA") regarding the provision

1 of technical and software support for Jungheinrich lift trucks. (*Id.* at ¶¶ 14, 16.) Plaintiff alleges
 2 Defendant MCFA is obligated to provide it with such technical and software support without cost
 3 through December 31, 2015. (*Id.*) However, on or about April 5, 2010, MCFA presented Plaintiff
 4 with a new software licensing agreement with J-AG, which Plaintiff was required to execute to
 5 continue receiving software support beyond May 31, 2010. (*Id.* at ¶ 17.) The new proposed agreement
 6 required Plaintiff to, among other things, pay a fee for continued software support. (*Id.*) Plaintiff
 7 refused to execute the new agreement and MCFA subsequently stopped providing Plaintiff with
 8 software support. (*Id.* at ¶ 18.)

9 Plaintiff filed a Complaint in San Diego Superior Court on November 29, 2010. In its
 10 Complaint, Plaintiff states claims for relief for (1) breach of contract, (2) fraud, (3) negligent
 11 misrepresentation, (4) conspiracy to defraud, (5) breach of the covenant of good faith and fair dealing,
 12 (6) intentional interference with prospective economic advantage, (7) negligent interference with
 13 prospective economic advantage, (8) violations of California Business and Professions Code § 17200,
 14 (9) declaratory relief, (10) specific performance, and (11) injunctive relief. On January 10, 2011,
 15 Defendant MCFA, allegedly the only named Defendant to have been properly served with the
 16 Complaint, removed the action to this Court. (Doc. 1.) At the time of removal, Plaintiff's *ex parte*
 17 motion for a TRO, preliminary injunction, and order to show cause was pending before the Superior
 18 Court. On January 11, 2011, the Court issued an Order requiring Defendants to file a response to
 19 Plaintiff's motion on or before January 14, 2011 and requiring Plaintiff to file a reply on or before
 20 January 19, 2011. (Doc. 6.) Defendants Jungheinrich and J-AG, together, and MCFA filed
 21 oppositions to Plaintiff's motion. (Docs. 8, 10.) Plaintiff did not file a reply.

22 II.

23 LEGAL STANDARD

24 "Temporary restraining orders are governed by the same standard applicable to preliminary
 25 injunctions." *Pimental v. Deutsche Bank Nat'l Trust Co.*, No. 09-cv-2264 JLS (NLS), 2009 WL
 26 3398789, at *1 (S.D. Cal. Oct. 20, 2009). Preliminary relief is an "extraordinary remedy that may only
 27 be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res.*
 28 *Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 376 (2008). On a motion for a preliminary injunction, a

1 plaintiff has the burden of establishing: 1) likelihood of success on the merits; 2) likelihood of
 2 irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in his favor; and
 3 4) an injunction is in the public interest. *Id.* at 374. With respect to the showing a plaintiff must make
 4 regarding his chances of success on the merits, the Ninth Circuit applies a sliding scale approach. *See*
 5 *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1049 (9th Cir. 2010). Under the sliding scale
 6 approach, the elements of the preliminary injunction test are balanced and, where a plaintiff can make
 7 a stronger showing of one element, it may offset a weaker showing of another. *Id.* “Therefore,
 8 ‘serious questions going to the merits’ and a hardship balance that tips sharply towards the plaintiff
 9 can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable
 10 injury and that the injunction is in the public interest.” *Id.* at 1053. However, it is necessary for a
 11 plaintiff to demonstrate each of the four elements for a TRO or preliminary injunction to issue.

12 III.

13 DISCUSSION

14 Plaintiff alleges it is entitled to software support in the servicing of Jungheinrich forklifts from
 15 Defendants and seeks a TRO or preliminary injunction “enjoining Defendants from requiring Plaintiff
 16 to execute any new agreement in order to get continued software support.” (TRO Motion at 9.) As
 17 an initial matter, although Plaintiff’s motion is phrased as requesting an order prohibiting Defendants
 18 from taking certain action, Plaintiff essentially seeks preliminary relief that compels Defendants to
 19 perform an affirmative act. At the time it filed this motion, Plaintiff was not receiving technical and
 20 software support from Defendants and, accordingly, any order from this Court requiring Defendants
 21 to provide such services would not be merely maintaining the status quo. Preliminary relief that seeks
 22 to compel performance of an affirmative act, as opposed to maintaining the status quo, is “particularly
 23 disfavored.” *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 776 (9th Cir. 2008)(citing
 24 *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)). With this in mind, the Court looks
 25 to the elements a party must prove in order for a TRO or preliminary injunction to issue.

26 A party seeking a TRO or preliminary injunction must demonstrate a likelihood of irreparable
 27 harm in the absence of preliminary relief. *Winter*, 129 S. Ct. at 374. Plaintiff states in its motion it
 28 is “losing customers because of Defendants’ refusal to provide the software and technical support

1 which they promised to provide. This irreparable harm is demonstrative by the statement of one of
 2 its customers who, after being unable to get the product that it purchased from Plaintiff serviced,
 3 stated: 'I will never do business with your company again.'" (TRO Motion at 5.) Plaintiff also alleges
 4 harm in the form of loss of goodwill and future business. However, Plaintiff fails to demonstrate how
 5 such harm is in fact irreparable. The only harm Plaintiff claims to be suffering is financial in nature
 6 and, even if the damages Plaintiff claims to be suffering are difficult to calculate, they may nonetheless
 7 be awarded. Typically, "monetary harm does not constitute irreparable harm." *Cal. Pharmacists*
 8 *Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009)(citing *L.A. Mem'l Coliseum Comm'n*
 9 *v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980)); *see also Sampson v. Murray*, 415 U.S.
 10 61, 90 (1974)("[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not
 11 usually constitute irreparable injury."). Claims of potential future loss of goodwill and prospective
 12 clients are similarly "monetary injuries which could be remedied by a damage award." *See L.A. Mem'l*
 13 *Coliseum*, 634 F.2d at 1202. Plaintiff fails to demonstrate that money damages would be insufficient
 14 to compensate it for any harm incurred in the absence of preliminary relief here. The fact that Plaintiff
 15 alleges to have stopped receiving software and technical support from Defendants in June 2010, but
 16 has only just now brought the instant motion for preliminary relief further suggests Plaintiff itself did
 17 not find the harm it was suffering truly irreparable. Therefore, Plaintiff falls short of meeting its
 18 burden of demonstrating it is likely to suffer irreparable harm in the absence of preliminary relief and
 19 Plaintiff's motion must be denied. Because the Court denies Plaintiff's motion on this basis, it need
 20 not reach the remaining elements of a TRO or preliminary injunction.

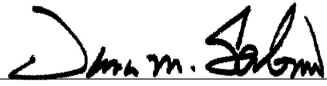
21 IV.

22 CONCLUSION

23 For the foregoing reasons, Plaintiff's *ex parte* motion for a temporary restraining order,
 24 preliminary injunction, and order to show cause is denied without prejudice.

25 **IT IS SO ORDERED.**

26 DATED: January 24, 2011

27 
 28 _____
 HON. DANA M. SABRAW
 United States District Judge